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Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 679

Case No. 682: FAGAN

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Vice-President, presiding; Mr. Hubert Thierry; Mr. Francis Spain;

Whereas, on 15 July 1992, Susan Fagan, a former staff member of the United Nations Children's Fund, hereinafter referred to as UNICEF, filed an application requesting the Tribunal, inter alia:

"...

to order the Respondent ... not to take any action to terminate the Applicant's permanent contract pending the outcome of the Tribunal's decision on her application;

8. ...

(b) to ... rule that ... the Applicant was entitled to return to her previous post as a result of the serious and cumulative irregularities that occurred in respect of the decision to remove her from her post;

(c) to ... rule further that UNICEF's procedures for the upgrading of posts including the treatment of incumbents, as well as their practices with respect to double incumbency of posts and their attempt to terminate the permanent contract of the Applicant violated the acquired rights of the Applicant...;

(d) to order the Respondent to abide by his decision that no action be taken to terminate the contract of the

Applicant for the purpose of allowing UNICEF to give her the benefit of staff rule 109.1(c)...;

(e) to award the Applicant appropiate compensation ... for the actual, consequential and moral damages suffered by the Applicant as a result of the Respondent's action or lack thereof;

(f) to fix, pursuant to article 9, paragraph 1 of the Statute and Rules, the amount of compensation to be paid in lieu of specific performance at two year's net base pay;

(g) to award the Applicant, as costs, the sum of $4,000.00."

Whereas the Respondent filed his answer on 27 November 1992;

Whereas the Applicant filed written observations on 28 January 1993;

Whereas the Tribunal heard the parties at a public hearing held on 18 October 1993;

Whereas, in November 1993, the Tribunal decided to adjourn consideration of the case until its 1994 Spring session;

Whereas, on 12 July 1994, the Tribunal put questions to the Respondent to which he provided answers on 13 and 14 July 1994;

Whereas, in September 1994, the Tribunal decided to adjourn consideration of the case until its 1994 Autumn session;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNICEF on 12 May 1966, as a File Clerk/Typist at the G-2 level. After serving on a succession of fixed-term appointments and, with effect from 12 November 1966, on a probationary appointment, she was granted a permanent appointment on 1 May 1968. During the course of her employment with UNICEF, the Applicant was promoted to the G-3 level, with effect from 1 February 1967, to the G-4 level, with effect from 1 July 1974 and to the G-5 level, with effect from 1 January 1980, with the functional title of Registry Assistant. On 10 July 1987, the Applicant was transferred to the post of Basic Assistant List (BAL) Control Clerk. On 13 January 1992, she was

assigned to the Office of the Director of the Programme Division. On 11 February 1993, the Applicant's permanent appointment was terminated and she separated from UNICEF.

Performance Evaluation Reports

The Applicant's performance as BAL Control Programme Assistant from 14 July 1988 to 31 December 1989 and from July to December 1990, was evaluated in two performance evaluation reports (hereinafter referred to as "the first report" and "the second report") which the Applicant signed "under protest" on 20 September 1991.

In February 1990, the Applicant completed her section of the "first report". In March 1990, her supervisor completed his sections and forwarded the report to the Applicant for signature. In his comments on her performance, her supervisor stated that because of her Staff Union activities, the Applicant spent "a lot of time away from the post" and that her answering phone calls from staff who sought her advice "had often resulted in interruption of the task at hand." On 4 April and 18 May 1990, the Applicant's supervisor asked her to sign the report, but she did not do so.

After an exchange of correspondence with her supervisor, on 27 July 1990 the Applicant initiated a rebuttal to the report in a memorandum to the Director, Programme Division. On 12 October 1990, the Applicant's second reporting officer signed the report. On 30 April 1991, she informed the Personnel Officer, through the Director, Programme Division, that the Applicant refused to sign her report.

On 18 July 1991, the Applicant wrote to the Personnel Officer, advising that she intended to avail herself of the services of an Ombudsperson. On 20 September 1991, the Applicant signed her first report stating: "I disagree with and protest the entire PER [Performance Evaluation Report] because the ratings given do not accurately reflect the quality or quantity of work, but were intended to penalize me for staff representational activities and to force me to give them up. ... I am signing

under protest. The matter has already been brought to the attention of an Ombudsperson."

During June and July 1991, the Applicant's supervisor and second reporting officer completed their parts of the Applicant's second report.

The Applicant discussed this report with the Director, Programme Division, her second reporting officer. On 13 August 1991, she wrote to him, expressing her disagreement with the low ratings she had been given and stating that she was being "set up to be thrown out of the Section and ultimately out of the Organization, as when in early 1990, my supervisors tried to oust me from the Section by preventing me from performing my job." She also alleged that comments concerning her staff representational activities were "not legitimate". On 21 October 1991, the Applicant's supervisor submitted her comments on this communication as part of the rebuttal process. The Applicant submitted further comments on 29 November 1991.

On 20 September 1991, the Applicant signed the second report "under protest", stating that she disagreed with specific ratings "because the PER is being used as a tool to punish me for my staff representational activities."

On 25 January 1992, the Ombudsperson submitted her report on the "second report" and recommended as follows:

> "17. ... [The] Ombudsperson reached the conclusion that the supervisor's assessment was flawed. It is recommended that ratings for professional competence be changed from 2 to 4; and quantity and quality of Work be changed from 3 to 4. The staff member was able to complete assignments with accuracy and met the objectives required despite the difficult circumstances she encountered in her specific work situation.
>
> 18. ... that the ratings for work relationships be changed from 3 to 5 and for communications skills to be changed from 4 to 5. It should be noted that staff member maintained an excellent relationship with all co-workers."

On 30 January 1992, the Ombudsperson submitted her report on the "first report" and recommended:

> "That due consideration be given to the fact that the staff member in her previous post received PER's that showed that her performance was good.
>
> That the supervisors and the staff member hold discussions to establish a reasonable cap on hours spent on staff activities."

On 7 February 1992, the Deputy Executive Director of UNICEF appraised the Ombudsperson's comments on the first and second reports, stating, inter alia:

> (A) First Report
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> "...
>
> ... [that] a total of one year and three months elapsed from the date of 20 October 1990, when [the Applicant] was given her PER and 30 January 1992, when you submitted your report as her Ombudsperson. We maintain that her deliberately delaying completion of her PER is not only a violation of the PER process but also renders her use of the ombudsperson system as time-barred.
>
> Therefore, as far as the Organization is concerned, [the Applicant's] 1989 PER is complete. She did indeed issue a statement on 27 July 1990, following completion of the PER by the First Reporting Officer, protesting the 1989 PER and this statement formed an integral part of the PER record."
>
> (B) Second Report
>
> "... It was not until we read your Ombudsperson's report, Part A, that we learned that [the Applicant] contacted you in August 1991, in connection with her 1990 PER. ...
>
> ... it is clear from her statement dated 20 September 1991, ... that while she signed under protest ... she made no mention of any intent to avail herself of the services of an Ombudsperson.
>
> ...

> The only logical explanation in this regard is that [the Applicant] did not intend to avail herself of our grievance procedure, but rather clearly opted only to make reference to her memo of 13 August 1991 to [the Director, Programme Division] registering her disagreements with the PER. In accordance with our established procedures in handling disagreements on completed PERs, this statement rendered her completion of the 1990 PER as final.
>
> Therefore, as we consider [the Applicant's] 1990 PER to be complete, we do not consider it appropriate to comment on the substantive issues you are now raising in your Ombudsperson report, Part A. ...
>
> ..."

Classification of Post

In September 1990, the Programme Division requested the reclassification of the Applicant's post from the G-5 to the G-6 level. The Job Classification Panel approved the upgrading, with effect from 1 January 1992, with the title of the post as "Programme Budget Assistant". The Applicant contends that: "She was never notified of the upgrading nor given the report to participate in the submission of the new job description as required by UNICEF policy."

On 1 August 1991, the Division of Personnel issued a Vacancy Announcement of the G-6 level post of Programme Budget Assistant, which was encumbered by the Applicant. The announcement was in accordance with the guidelines contained in UNICEF administrative instruction CF/AI/352/Amend.4 and CF/AI/352/Amend.4/Add.1. Five staff members applied for the post, including the Applicant.

According to the record, a Selection Advisory Panel (SAP) reviewed the qualifications of all candidates and recommended to the Appointment and Promotion Committee (APC) a staff member other than the Applicant for the post. On 12 November 1991, the APC endorsed the recommendation by the SAP. The Minutes of the APC meeting read, in part, as follows:

"...

[The Applicant], the Committee noted, was placed in the subject post in 1987, when her then post of Registry Clerk was abolished. It was reported that she has been given extensive on-the-job training, but that her performance nevertheless, has on balance, not been fully satisfactory as indicated in her Performance Reports since joining the Section.

The Committee conducted a thorough and lengthy review of the case, bearing in mind the fact that the post was encumbered, and, taking all factors into account, concluded that [the other staff member] was clearly the best qualified candidate. Accordingly, the Committee endorsed the Selection Advisory Panel's recommendation for [the other staff member's] appointment to the subject post, with promotion to the upgraded G-6 level, effective 1 January 1992."

In a letter dated 22 November 1991, the Director of the Division of Personnel informed the Applicant that she had not been selected for the post she encumbered and that she would be given "every reasonable consideration for priority placement in another suitable vacant post." He concluded: "In our placement efforts, we will take into account your overall performance, qualifications and contractual status as per AI 1986-10 on 'Personnel Policies and Procedures applicable to incumbents of posts which are to be abolished'. In the event that we are unable to place you in a suitable post, your permanent appointment will be terminated as of 31 May 1992, with the appropriate termination indemnity."

On 20 December 1991, the Applicant requested a review of the administrative decision not to appoint her to the post of Programme Budget Assistant.

On 8 January 1992, the Director of the Division of Personnel wrote to the Applicant, informing her that she would "be attached to the Director's Office, Programme Division, with effect from 13 January 1992, through 31 May 1992." He also reiterated his advice that she apply for other posts for which she might be qualified.

On 9 January 1992, the Applicant asked the Secretary of the Joint Appeals Board (JAB) to arrange, under staff rule 111.2(a), for the designation by the Presiding Officer of the JAB of "a Chairperson or member of the appropriate JAB, ... with a view to reaching a conciliatory conclusion of the matter." She also requested a suspension of action on the decision to remove her from her post. Conciliation proceedings took place but it was not possible to reach agreement.

On 24 January 1992, the Deputy Executive Director informed the Applicant, on behalf of the Secretary-General, that the administrative decision not to select her for the post she encumbered had been "undertaken fairly and properly..." and would be maintained.

On 10 February 1992, the Applicant lodged an appeal with the JAB and, at the same time, requested, under staff rule 111.2(f), suspension of action of the contested decision and the "related action underway to remove me from my job." In its report adopted on 28 February 1992, the JAB recommended that "any action to remove [the Applicant] from her post be suspended until the [JAB] submits its recommendation on the substance of the appeal..." On 27 February 1992, the Director, Office of the Under-Secretary-General for Administration and Management, informed the Applicant that the Secretary-General could not accept this recommendation as the administrative decision she was contesting had already been implemented.

The JAB adopted its report on the merits of the case on 9 April 1992. Its conclusions and recommendations read, in part, as follows:

> "38. ... the Panel concluded that the procedures laid down by UNICEF's appointment and promotion bodies to fill the upgraded post in question were followed. However, the Panel felt that the [Applicant's] PERs submitted to the appointment and promotion bodies, were tainted by extraneous factors, which affected the full review of [the Applicant's] candidature by her peers.
>
> ...

40. The Panel recommends that UNICEF find, without further delay, a suitable post for the [Applicant], where she will be able to utilize her skills and the long-time experience gained in the Organization. No action should be taken to terminate the [Applicant]'s permanent appointment.

41. Bearing in mind that staff representational activities are part of staff members' official duties necessary for staff management consultations the Panel recommends that the [Applicant] and her supervisors reach a better understanding as to the fulfilment of the [Applicant]'s duties as a staff representative, which would enable the [Applicant] to carry out her duties in the office together with her responsibilities as a staff representative, under the provisions of staff rule 108.1.

42. Having concluded that the [Applicant] was unfairly treated in connection with her consideration for the upgraded post, and that she was improperly threatened with termination of her permanent appointment, the Panel recommends that the [Applicant] be paid the equivalent of three months' net base salary, and makes no further recommendations in support of the appeal."

On 21 May 1992, the Officer-in-Charge of the Department of Administration and Management informed the Applicant that the Secretary-General:

"... has examined your case in the light of the Board's report. He agrees with the Board's finding that there was no evidence of any ill-intention on the part of UNICEF towards you in the filling of the upgraded post. He cannot, however, share the Board's reservations about the fairness of the selection process. ... The Secretary-General finds no impropriety in UNICEF's decision to proceed with the selection without waiting for the Ombudsperson's report on your 1989 PER as most of the delay was due to your initial refusal to complete your 1989 performance evaluation report. Such action cannot bring the UNICEF selection process to a halt. Moreover, the selection process cannot be vitiated by the fact that it took place without consideration of the Ombudsperson's report on the 1990 PER since UNICEF was not on notice that such a report was forthcoming. The Secretary-General has also noted that the promotion bodies had received copies of your rebuttal statements prior to the consideration of your case. Your right to full and fair consideration was therefore respected.

As regards UNICEF's policy that an upgraded post is regarded as a new post and that the former post at the lower level is considered abolished, the Secretary-General finds that this policy is consistent with staff regulation 2.1. He further finds that UNICEF instruction CF/AI/352/ Amend.4/ Add.1 does not conflict with staff rule 109.1(c) but provides guidance for reviewing cases of locally recruited staff encumbering upgraded posts. Its procedures must be followed, but a staff member whose post has been upgraded is also entitled to the application of the provisions of staff rule 109.1(c) prior to any action being taken towards separation from service.

The Secretary-General has noted that you had been given a reasonable amount of official time off to carry out your representational responsibilities. He is satisfied that your supervisors provided you with every reasonable support to carry out those responsibilities, as well as your responsibilities in respect to your duties in the office.

On the basis of the above considerations, the Secretary-General has decided

(a) to reject the recommendation that you be paid three months' net base salary;

(b) to accept the recommendation that no action should be taken to terminate your appointment, for the purpose of allowing UNICEF to give you the benefit of staff rule 109.1(c), insofar as it applies to locally recruited staff;

(c) to request UNICEF to include a copy of the Board's report in your Official Status file;

(d) to take no action with respect to your representational activities.

..."

According to the record, on 26 May 1992, the Applicant's candidacy for two secretarial posts was reviewed in a meeting of the APC. The APC concluded that the Applicant did not meet the minimum requirements for these posts. At the same meeting, the APC reviewed the Applicant for eight posts encumbered by staff members holding fixed-term appointments. According to the Respondent, "the APC was made aware of the Applicant's situation (abolition of her post, her permanent appointment, her JAB appeal and the

applicability of staff rule 109.1(c))". The APC did not recommend the Applicant for any post.

On 28 May 1992, the Deputy Executive Director (Operations) informed the Applicant as follows:

> "...
>
> As decided by the Secretary-General, UNICEF will continue its placement efforts on your behalf, subject to the availability of suitable posts in which your services can be effectively utilized, to give you the benefit of staff rule 109.1(c), insofar as it applies to locally recruited staff. Thus, the notice period of six months given to you on 22 November, is hereby extended through 31 August 1992. In the event we are unsuccessful in placing you in a suitable post by that date, your permanent appointment will be terminated, with appropriate termination indemnity.
>
> ..."

In a letter dated 10 June 1992, the Applicant asked the Under-Secretary-General for Administration and Management whether the letter of 28 May 1992, from the Deputy Executive Director, was consistent with the Secretary-General's decision of 21 May 1992, that "no action would be taken to terminate [the Applicant's] appointment for the purpose of allowing UNICEF to give the benefit of staff rule 109.1(c)". In a reply dated 23 June 1992, the Under-Secretary-General for Administration and Management stated that there was "no contradiction" between the two letters: "the purpose of the extension of the six-month notice period previously given to [the Applicant] by UNICEF is to allow for [her] rights under staff rule 109.1(c) to be fully respected."

On 17 June 1992, the Applicant requested the Secretary-General to review the administrative decision contained in the letter of 28 May 1992, from the Deputy Executive Director (Operations), alleging that the decision was "contrary to the unanimous recommendation made by the JAB on my case ... adopted as a decision of the Secretary-General as conveyed to me in the letter of the Officer-in-Charge dated 21 May 1992". She added: "The

decision of the Secretary-General is quite clear in that there are no time limits imposed to find an appropriate post for me." In a reply dated 15 July 1992, the Deputy Executive Director (Operations) referred the Applicant to the letter of 23 June 1992, from the Under-Secretary-General for Administration and Management and informed her that the decision would be maintained.

On 15 July 1992, the Applicant filed with the Tribunal the application referred to earlier.

On 17 July 1992, the Applicant lodged an appeal with the JAB asking the JAB to recommend to the Secretary-General that "UNICEF suspend action on the termination of my permanent appointment by 31 August 1992, pending its in-depth consideration of the substance of UNICEF's administrative decision..."

On 3 August 1992, the Ad Hoc Deputy Co-ordinator of the Panel on Discrimination and Other Grievances (Panel on Discrimination) submitted a report to the Executive Director and to the Secretary-General on the complaint filed by the Applicant with the Panel that her PERs for 1989 and 1990 had been incorrectly drawn up and that, as a result, she had not been selected to fill the post which she had held for four years, when it was reclassified to the G-6 level.

In a reply dated 31 August 1992, the Deputy Executive Director (Operations) informed the Panel on Discrimination that the Executive Director had acted on the complaints by the Applicant in the light of the JAB report and that he did not propose to take any further action thereon.

The JAB adopted its report on the suspension of action on 14 August 1992. Its conclusion and recommendation read as follows:

"Conclusion and recommendation

13. The Panel concluded that by shifting the burden for finding a post from the Organization to the [Applicant], and by setting the deadline, the possibility that a suitable post would become available was diminished. UNICEF has thereby ignored the Secretary-General's directive and, therefore, placed an

additional burden on the [Applicant] during an already stressful time.

14. Therefore, the Panel recommends that all action to separate the [staff member] from service be suspended pending the decision on the substance of this appeal, and that during such time, and if necessary, thereafter, the Secretary-General's directive to find her a suitable post be implemented."

On 25 August 1992, the Assistant-Secretary-General for Human Resources Management transmitted to the Applicant a copy of the JAB report and informed her as follows:

"The Secretary-General has taken note of the Board's report and decided to approve the recommendation of the Panel that all action to separate you from service be suspended pending the decision on the substance of your appeal. He requests that the Panel expedite consideration of your appeal and submit its report by 15 October 1992."

The JAB adopted its report on the merits of the case on 13 October 1992. Its conclusions and recommendations read, in part, as follows:

"Conclusions and recommendations

21. ... The Panel ... recommends that UNICEF extend the Appellant's service for a final three-month period from the date of the Secretary-General's decision on this report and expend every effort on a priority basis to resolve the issue with the Appelant. Towards that end the Panel also recommends that the Appellant herself aggressively pursue placement opportunities during that time."

On 12 November 1992, the Director of Personnel transmitted to the Applicant a copy of the JAB report and informed her as follows:

"The Secretary-General ... concurs with the Board's recommendation that your service should be extended for a final three-month period from today during which every effort should be made both by UNICEF and yourself to resolve the placement issue. At the end of this three-month period, in the event no suitable post has been found, you will be separated from service with appropriate termination indemnity.

> The Secretary-General has also noted that UNICEF has already expended consistent efforts in pursuing the issue, including a review by its Appointment and Promotion Committee of your suitability against 19 posts, including vacant (both current and projected) and fixed-term G-level posts."

On 19 November 1992, the Deputy Executive Director (Operations) wrote to the Applicant as follows:

> "In line with the decision of the Secretary-General [of 12 November 1992], your service will be extended for a final three-month period from 12 November 1992 through c.o.b. [close of business] 11 February 1993. During this time period, you will continue to be attached to the Director's Office, Programme Division, and every effort will be made by UNICEF to resolve the placement issue.
>
> We also note the Secretary-General's statement that every effort should also be made by you in this regard.
>
> As per the decision of the Secretary-General, at the end of this three-month period, in the event no suitable post has been found, you will be separated from service with appropriate termination indemnity."

In a letter dated 8 February 1993, the Applicant requested the Secretary-General to review this administrative decision. On the same date, she lodged an appeal with the JAB, requesting a suspension of action on the contested decision. The JAB adopted its report on 16 February 1993. Its considerations and recommendations read, in part, as follows:

> "Considerations and recommendations
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> ...
>
> 21. The Panel was not in a position to judge the efforts made by UNICEF to resolve the [Applicant]'s placement problem. On the other hand the Panel felt that in reviewing the suitability of the [Applicant] for other possible posts, UNICEF has not given the [Applicant] any preference over other staff members who had other types of appointment, as required by staff rule 109.1(c)(i).
>
> 22. The Panel found that it had no competence to re-open issues previously dealt with by the JAB, issues which had

been the subject of a final decision by the Secretary-General.

23. Accordingly, the Panel decided to recommend that the [Applicant]'s request for suspension of action be denied."

On 17 February 1993, the Director of Personnel transmitted to the Applicant a copy of the JAB report and informed her as follows:

"The Secretary-General has re-examined your request in the light of the Board's report. While he has reservations in regard to the Panel's observation on the treatment of your candidature by UNICEF in its attempt to resolve your placement problem, he has decided, in accordance with the Board's recommendation, not to accept your request for suspension of action."

The Applicant had separated from the service of UNICEF on 11 February 1993. After her separation from service, the Applicant was paid four months of her termination indemnity. From 16 June 1993 to date, the Applicant has been employed by the United Nations on a series of fixed-term appointments of one month at the G-4 level.

Whereas the Applicant's principal contentions are:

1. The Applicant's performance evaluation reports were tainted by prejudice so as to provide an improper basis for the decision not to appoint the Applicant to her former post, after it had been reclassified.

2. The Applicant's rights were violated by the Executive Director's decision of 28 May 1992, to limit to a three month period the search for alternative posts mandated by staff rule 109.1(c), thereby threatening her with termination of her permanent appointment earlier than envisaged in the Secretary-General's decision.

3. The Applicant's rights were violated by the Respondent's decision to take no action on certain recommendations of the JAB.

Whereas the Respondent's principal contentions are:

1. Selection of another staff member for the post in question was a valid exercise of administrative discretion. The Applicant's lengthy delays in instituting grievance procedures do not give her a right to suspension of the selection process.

2. No credible evidence exists indicating that the evaluation of the Applicant, as recorded in her performance evaluation reports, was tainted by prejudice or other improper motive.

3. UNICEF did not violate the Applicant's rights in the procedure of reclassification of the Applicant's post.

4. Staff do not have a right to expect the Secretary-General to accept the recommendations of joint bodies, even if unanimous.

5. The decision of the Secretary-General has been properly implemented and takes account of the rights of staff whose posts have been abolished to benefit from the procedures set out in staff rule 109.1(c).

6. Staff are entitled to a reasonable period of time for staff representational activities. The Applicant has provided no evidence that she was unreasonably denied release from her duties for such activities.

The Tribunal, having deliberated from 20 October to 16 November 1993 in New York, from 28 June to 21 July 1994 in Geneva and from 14 October to 9 November 1994 in New York, now pronounces the following judgement:

I. The Applicant, a former staff member of UNICEF, encumbered a post at the G-5 level. This post was reclassified to the G-6 level, with effect from 1 January 1992. As a consequence, and in accordance with the policy followed by UNICEF, the post at the G-6 level was considered a new post and advertised as a vacancy. The Applicant applied for this post, but was unsuccessful. She was informed, on 22 November 1991, that another candidate had been

selected and that her permanent appointment would be terminated if no suitable post could be found for her.

II. The Applicant alleged that the decision not to appoint her to the new post was based on incomplete information "since my last two performance evaluation reports are still unresolved". The Administration decided to maintain its decision and the Applicant lodged an appeal before the JAB. She requested a stay of the decision and reiterated the arguments set forth when requesting administrative review.

III. The JAB found that "the Appellant's PERs [performance evaluations reports] submitted to the Appointment and Promotion bodies, were tainted by extraneous factors, which affected the full review of Appellant's candidature" and that she had been "improperly threatened with termination". The JAB recommended an indemnity of three months salary.

It also recommended that UNICEF "find, without further delay, a suitable post for the Appellant" and that "no action be taken to terminate the Appellant's permanent appointment." As the JAB viewed the Applicant's PERs, which were submitted to the APB, as tainted by extraneous factors connected with the Applicant's: Staff Union activities, it also recommended that "the Applicant and her supervisors reach a better understanding as to the fulfillment of the Applicant's duties as a staff representative."

IV. The Secretary-General, in his decision of 21 May 1992, did not completely follow the recommendation of the JAB. While the JAB recommended "that UNICEF find, without further delay, a suitable post for the Appellant", the Secretary-General said that "no action should be taken to terminate your appointment, for the purpose of allowing UNICEF to give you the benefit of staff rule 109.1(c)." The Tribunal notes that staff rule 109.1(c) does not preclude the possibility of a termination.

V. The Applicant was not satisfied with the Secretary-General's decision and appealed to the Tribunal, submitting several pleas, including a request "to rescind the decision of the Secretary-General insofar as it rejects the unanimous recommendation of the JAB that UNICEF find without further delay a suitable post for the Applicant." In this respect, the Tribunal finds that the Respondent must give full effect to article 109.1(c) of the Staff Rules which states, in part, that "subject to the availability of suitable posts in which their services can be effectively utilized, staff members with permanent or regular appointments shall be retained in preference to those on all other types of appointments."

VI. The Tribunal notes that the Applicant in her pleas before the Tribunal challenges the procedure of UNICEF in reclassifying posts, and the treatment of incumbents of those posts, as a violation of her acquired rights. She also requests the Tribunal "to find that the Applicant was entitled to return to her previous post." While this challenge raises an important issue, as the Tribunal finds in favour of the Applicant on other grounds, there is no need to address it. Moreover, although there is discussion of the UNICEF reclassification procedure on the record, the Tribunal has some question as to whether the issue was properly raised in the initial stages of the proceedings before the JAB.

VII. The Tribunal finds no merit in the Applicant's claim that she has a right to be appointed to the new G-6 post. According to its jurisprudence, staff members have no right to be appointed to any given post; they are only entitled to be duly considered for it. Nevertheless, the Tribunal is of the view that the conditions in which the Applicant's candidacy was considered are open to criticism. The post was filled without awaiting the results of the rebuttal procedures connected with the Applicant's performance evaluation reports. While it must be acknowledged that those procedures were unduly prolonged by the Applicant's initial refusal

to sign the reports concerned, it appears that, in the last analysis, the failure of her candidacy was attributable to the unfavourable evaluation and ratings given in those reports.

According to the Applicant, her performance evaluation reports for the periods 14 July 1988-December 1989 and July-December 1990 (which is when she was called upon to engage in union and staff representational activities concurrently with her office duties) were drafted with the deliberate intention of discouraging her from continuing her union and representational activities or, at the least, of inducing UNICEF to adopt a more clearly defined policy regarding the rights and obligations of staff representatives and the choice of union bodies authorized to defend the interests of UNICEF staff.

The Tribunal has taken the two disputed reports into consideration. It notes that they bring out the difficulty of the tasks entrusted to the Applicant, for which she was not well-prepared. The first of these reports mentions her praiseworthy efforts to cope with her professional obligations. It says that: "It is well recognized that the staff member has made tremendous efforts to learn and accomplish the tasks mentioned in 2.1." (The reference is to computer work). Mention is also made, however, of inadequacies deriving from the extra work involved in union and representational activities. These inadequacies are reflected more in the ratings than in their accompanying comments.

The Tribunal has equally taken note of the opinions of the Ombudsperson enlisted by the Applicant. In one report, dated 30 January 1992, this authority recommended that the Applicant and her supervisors should hold discussions so as to define the "reasonable time" that she could devote to her union and representational activities. In a second report, dated 25 January 1992, the Ombudsperson found that the performance evaluation report for the period July-December 1990, was flawed and recommended that the Applicant's ratings should be revised. In addition, the Joint Appeals Board, which was seized of the Applicant's complaint, took the view that the two performance

evaluation reports were tainted by extraneous factors. (Cf. paragraph 38 of the Joint Appeals Board's report of 9 April 1992).

These convergent opinions, which are highly favourable to the Applicant's case, deserve consideration. However, the Tribunal is of the opinion that the supervisors' discriminatory intentions have not been proven. On the other hand, it appears that a regrettable situation was created with respect to the evaluation of the Applicant's performance, as a result of a lack of definition of her obligations, particularly the uncertainty regarding the time that she should devote to her professional and representational activities, respectively. In the Tribunal's view, it is this vagueness that led to the seeming inconsistencies in the wording of the Applicant's performance evaluation reports. As recommended by the Ombudsperson, adjustments were required to enable the Applicant to cope simultaneously with her office duties and her personnel representation activities without being overburdened. An arrangement should have been made to resolve this matter, in accordance with the directive laid down in administrative instruction ST/AI/293. The failure of the UNICEF Administration in this regard is culpable.

VIII. In the opinion of the Tribunal, great significance should be attached to the last sentence of paragraph 11 of administrative instruction ST/AI/293. It is important for arrangements to be made in each case in order to determine the facilities or assistance which staff representatives should receive and the time which should be allotted to their staff representational activities, on the one hand, and their office duties, on the other. These arrangements may be either formal or informal, but it is important that they should be concluded in advance. In other words, when a staff member is called upon to engage in representational activities, all concerned should know where they stand, so as to avoid disputes.

It would seem that, in most cases, the application of these rules does not create any major difficulty. However, this was not

so in the present case, which comprises various contentious episodes raising questions concerning the Applicant's union and representational activities and their relationship with her office duties.

Thus, the uncertainty regarding the Applicant's obligations, deriving from the failure to conclude an arrangement as provided in administrative instruction ST/AI/293, was the primary source of the subsequent events that resulted in the rejection of her candidacy. Therefore, the Tribunal concludes that the selection process by which the G-6 post was filled was flawed.

IX. The Tribunal must now determine whether the decision of 28 May 1992, and the subsequent decisions which ultimately resulted in the termination of the Applicant's permanent appointment with UNICEF, by a decision of 12 November 1992, are valid or whether, on the contrary, these decisions should be annulled, either because of discrimination suffered by the Applicant by reason of her union and staff representational activities or on any other ground. The Tribunal will answer these questions based on the following relevant staff regulations and rules and administrative instructions.

X. Staff regulation 8.1(a) states: "The Secretary-General shall establish and maintain continuous contact and communication with the staff in order to ensure the effective participation of the staff in identifying, examining and resolving issues relating to staff welfare, including conditions of work, general conditions of life and other personnel policies." Paragraph (b) of the same article provides: "Staff representative bodies shall be established and shall be entitled to initiate proposals to the Secretary-General for the purpose set forth in subparagraph 1(a) above." Lastly, staff rules 108.1 and 108.2, constituting chapter VIII of the Staff Rules, contain detailed provisions concerning "Staff representative bodies" and "Joint staff-management machinery". It follows from these texts that

union and staff representational activities are not only legitimate but that, as conceived by the Staff Regulations and Rules, they meet the concern to involve staff and management thereby contributing to the proper functioning of the Organization.

XI. In order to ensure that the statutory provisions concerning staff representation are not, either directly or indirectly, rendered ineffective, staff members who exercise responsibilities as representatives of their colleagues in the bodies where such representation is required must have the necessary time and facilities for that purpose. This concern is addressed by administrative instruction ST/AI/293, according to which: "The functions of staff representatives are official. Staff representatives shall have the same rights, duties, obligations and privileges as other staff members of the United Nations under the Staff Regulations and Rules and shall enjoy protection against any discriminatory treatment or prejudicial action based on their status or activities as staff representatives." The official nature of the functions of staff representatives implies that time spent in exercising these functions should not be regarded differently from the time spent on office duties, but as being on a par with the latter.

XII. Paragraph 9 of administrative instruction ST/AI/293 stipulates: "Staff representatives shall be entitled to attend established meetings of the Staff Council or corresponding staff representative body. Staff representatives shall also be granted reasonable official time to attend meetings of related bodies or to represent the staff in joint advisory bodies, including standing committees, working groups, etc. The proportion of official time spent by staff members on representational activities should not be unreasonable in relation to the carrying out of assigned duties." It is provided that the President or Chairman of the Executive Committee of each Staff Council in the locations where the United Nations has offices may be granted full-time release from

assigned duties if the number of staff members represented is 1,000 or more, or half-time release, if that number is less than 1,000. With regard to other members of the Executive Committee, it is stated (paragraph 11) that: "Other members of the Executive Committee should be afforded the necessary time required for them to carry out their functions promptly and efficiently. The details of such arrangements are to be determined in accordance with the procedures set out in chapter VIII of the Staff Rules." The concept of "reasonable time" calls for a definition which is not contained in the administrative texts. The Tribunal considers that the "reasonable time" that must be afforded to staff members discharging staff representational responsibilities is the time necessary and sufficient for the exercise of those responsibilities in accordance with the provisions of the Staff Regulations and Rules. It varies in each case, according to the scale of the representational tasks and their distribution over time.

XIII. Her candidacy for the reclassified post not having been accepted, the Applicant found herself without employment. It is not contested that, as the holder of a permanent appointment, the Applicant was entitled to benefit from the provisions of staff rule 109.1(c). That paragraph provides that staff members whose posts have been abolished should be given preference in being retained within the Organization, subject to the availability of suitable posts in which their services can be effectively used. The Tribunal has referred repeatedly to the application of this provision, which is vital to the security of staff who, having acquired permanent status, must be presumed to meet the Organization's requirements regarding qualifications. In this connection, while efforts to find alternative employment cannot be unduly prolonged and the person concerned is required to cooperate fully in these efforts, staff rule 109.1(c) requires that such efforts be conducted in good faith with a view to avoiding, to the greatest extent possible, a situation in which a staff member who has made a career within the Organization for a substantial period

of his or her professional life is dismissed and forced to undergo belated and uncertain professional relocation.

The procedure followed in this regard in the Applicant's case was a complex one. Following the rejection of her candidacy for the post which she had been occupying until its reclassification, she was informed, on 22 November 1991, that, unless another post could be found for her, her permanent contract would be terminated on 31 May 1992, under administrative instruction CF/AI/1986-10 of 26 November 1986. This instruction refers, inter alia, to the situation of UNICEF staff members whose posts are abolished. However, the Secretary-General informed the Applicant on 21 May 1992, that, pursuant to the recommendation of the Joint Appeals Board (JAB), he had decided that no action should be taken to terminate her appointment, so as to allow UNICEF to give her the benefit of staff rule 109.1(c). Nevertheless, on 28 May 1992 (i.e. one week after the Secretary-General's communication), the Deputy Executive Director of UNICEF notified the Applicant that her appointment would be terminated on 31 August 1992, if placement efforts under staff rule 109.1(c) were unsuccessful.

The Applicant requested administrative review of this decision and subsequently lodged an appeal with the JAB. The JAB recommended that "all action to separate [the Applicant] from service be suspended" pending a decision on the substance of the appeal. The Secretary-General accepted this recommendation. The JAB, in its report dated 13 October 1992, on the merits of the case, recommended that "UNICEF extend the [Applicant]'s service for a final 3-month period from the date of the Secretary-General's decision on this report and expend every effort on a priority basis to resolve the issues with the [Applicant]." On 12 November 1992, the Applicant was informed that the Secretary-General accepted the JAB's recommendation. Then, on 19 November 1992, the Deputy Executive Director of UNICEF informed the Applicant that if by 11 February 1993 no suitable post had been found, she would be separated from service.

XIV. These various decisions gave rise to controversies between the parties, but the Tribunal does not deem it necessary to enter into them. The Tribunal merely has to address the question of whether staff rule 109.1(c) was correctly applied. In this regard, the Tribunal notes that the efforts of the Administration to find the Applicant alternative employment during the period of seven months, extended by a further three months following the decision of the Secretary-General pursuant to the recommendation of the JAB, should not be regarded as abnormal. As is the case with the failure of the Applicant's candidacy for the post which she wished to fill, the Tribunal does not have any formal evidence of discrimination against her in the process of applying staff rule 109.1(c). On the other hand, it appears that the failure of efforts to find alternative employment for the Applicant derived from the negative assessment of her performance in the absence of an arrangement regarding her obligations during the period July 1988-1990, as stated by the Tribunal in paragraph VIII above.

The Tribunal concludes that the Applicant's complaints regarding alleged discrimination against her because of her union and staff representational activities are not substantiated by conclusive evidence. On the other hand, the procedure applied to her, under staff rule 109.1(c), including her dismissal at the end of the period set by the decision of 19 November 1992, was vitiated by the failure to conclude, at the proper time, the arrangement provided for by administrative instruction ST/AI/293 and that, consequently, the rules laid down in chapter VIII of the Staff Rules and the procedures envisaged in that administrative instruction were not followed.

XV. Accordingly, the Tribunal:

1. Decides to rescind the decision taken by the Secretary-General that led to the termination of the Applicant's permanent

appointment, with effect from 11 February 1993 and that the Applicant should be reinstated as of that date.

2. Fixes the compensation to be paid to the Applicant at one year of her net base salary at the rate in effect on the date of her separation from service if the Secretary-General decides, within thirty days of the notification of the judgement, in the interest of the United Nations, not to reinstate the Applicant.

3. Decides that the Applicant should be paid the balance of the statutory termination indemnity to which she is entitled whenever the fixed-term appointment she may have with the United Nations expires. The Applicant's right to this termination indemnity shall cease if at that time or prior thereto she is reemployed as a permanent staff member.

XVI. The Applicant has requested the amount of 4,000 dollars for costs incurred in pursuing the appeal. The Tribunal, having considered the Applicant's request and in accordance with its finding in paragraph XXIX of Judgement No. 237, Powell (1979), decides to reject it.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Hubert THIERRY
Member

Francis SPAIN
Member

New York, 9 November 1994

R. Maria VICIEN MILBURN
Executive Secretary